Supreme Court, U.S.
FILED
NOV 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-666

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ERNESTINE FORREST,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION, et al.,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

IRELL & MANELLA
JAMES F. ELLIOTT*
WENDY A. WOLF
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
(213) 277-1010

**Counsel of Record*

Counsel for Respondents

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTION PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit, by affirming the dismissal of petitioner's suit under Rule 4(j) of the Federal Rules of Civil Procedure based upon the record before it, deviated so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

LIST OF PARTIES AND RULE 28.1 LIST

The following parties to the proceedings below now come before this Court:

> Ernestine Forrest, Petitioner; and
> Occidental Petroleum Corporation, Dudley E. Miller, Gerald M. Stern, Ronald P. Klein, Robert E. Sawyer and Armand Hammer, Respondents.

Occidental Petroleum Corporation does not have a parent company. Occidental Petroleum Corporation's affiliates and subsidiaries (other than wholly-owned subsidiaries) are IBP, Inc. and Canadian Occidental Petroleum Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	iv
CORRECTED STATEMENT OF OPINIONS BELOW	2
CORRECTED STATEMENT OF JURISDICTION	2
CORRECTED STATEMENT OF THE CASE	2
REASONS THE PETITION SHOULD BE DENIED	6
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	Page
Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982)	8
Insurance Corp. v. Campagnie des Bauxites, 456 U.S. 697 (1982)	8
Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir. 1986)	5
Rice v. Sioux City Cemetery, 349 U.S. 70 (1955)	6, 7
Texas v. Mead, 465 U.S. 1041 (1984)	7
Wei v. Hawaii, 763 F.2d 370 (9th Cir. 1985)	8
Whale v. United States, 792 F.2d 951 (9th Cir. 1986)	8

Statutes and Rules

28 U.S.C. § 1254(1) (1988)	2
Fed. R. Civ. P. 7 (1988)	4
Sup. Ct. R. 17 (1988)	7, 8
Sup. Ct. R. 22.5 (1988)	6, 8, 9

No. 88-666

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

ERNESTINE FORREST,
Petitioner,

v.

OCCIDENTAL PETROLEUM CORPORATION, et al.,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Occidental Petroleum Corporation, Dudley E. Miller, Gerald M. Stern, Ronald P. Klein, Robert E. Sawyer and Armand Hammer respectfully request that this Court deny the petition for writ of certiorari of Ernestine Forrest, ("petitioner"), which seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals"). That opinion, contained in an unpublished amended memorandum, has been reprinted in the petitioner's Appendix A, at 7a.

The petitioner has misstated the opinions below, the basis of jurisdiction and the statement of the case. The respondents have corrected these misstatements.

CORRECTED STATEMENT OF OPINIONS BELOW

The opinions below, none of which were reported, have been reprinted in the petitioner's Appendix as follows:

Petitioner's Appendix	Opinion and Court
Appendix A, at 7a	Amended memorandum, filed May 28, 1988, (United States Court of Appeals for the Ninth Circuit)
Appendix B, at 19a	Order dismissing action, filed February 28, 1986, (United States District Court for the Central District of California)
Appendix B, at 21a	Order denying motion for reconsideration, filed April 29, 1986, (United States District Court for the Central District of California)

CORRECTED STATEMENT OF JURISDICTION

The petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1254(1) (1988).

CORRECTED STATEMENT OF THE CASE

This petition arises out of the Court of Appeals' affirmance of the United States District Court for the Central District of California's dismissal of the petitioner's complaint. That dismissal was required because the petitioner, contrary to Rule 4(j) of the Federal Rules of Civil Procedure, failed to serve the complaint upon respondents Occidental Petroleum Corporation, ("Occidental"), or upon the individual respondents, (collectively referred to as "respondents"), for over sixteen months.

Although nominally proceeding before this Court, the Court of Appeals and the U.S. District Court for the

Central District of California, ("District Court"), as a *pro se* litigant, the petitioner has been admitted to practice as an attorney before the federal district court for over ten years.

As the record below evidences, the petitioner was hired as a staff attorney by Occidental in 1978. In the summer of 1982, the petitioner, along with several caucasian-male staff attorneys, was laid off pursuant to a reduction in work force. On March 2, 1983, the petitioner filed with the EEOC a Title VII charge against Occidental alleging sex, race and marital status discrimination.

On November 29, 1984, the petitioner filed in the District Court the federal Title VII complaint out of which this petition arises.[1] The petitioner, however, never made a single attempt to serve this complaint for over

---

[1]The petitioner seeks review of the Court of Appeals' decisions, despite the pending status of her two other state court actions arising out of the same facts. Specifically, on July 6, 1983, the petitioner filed in the Superior Court of the State of California a common law wrongful termination action against the defendants based on the same "facts" set forth in the EEOC charge. After extended briefing on the question of the petitioner's three-year delay in attempting service of process, the state court dismissed her civil complaint due to her inability to justify the delay. The state court ultimately sanctioned the petitioner personally in the amount of $2,400 as redress for her frivolous arguments against dismissal. The California Court of Appeal affirmed the dismissal of Occidental and one individual by order of May 17, 1988 and has yet to consider the appeal with respect to the remaining individuals.

On August 31, 1984, the petitioner filed a *second* state court complaint against Occidental and certain individuals, this time pursuant to California's cognate anti-discrimination statutes. This complaint was *also* based on the same "facts" alleged in the EEOC charge, and asserted under state law the same discrimination charges contained in the federal complaint at issue here. That case is pending in the Los Angeles County Superior Court.

sixteen months. *Amended Memorandum*, filed May 25, 1988, ("Amended Memorandum"), Petitioner's Appendix A, at 7b. Noting this unexcused delay, the District court dismissed the complaint *sua sponte* on February 28, 1986.

On March 10, the petitioner, contrary to Rules 59(e) and 5(b) of the Federal Rules of Civil Procedure, left a purported "motion for reconsideration" with a security guard at Occidental, despite admittedly being aware of Irell & Manella's status as attorneys of record, and the fact that at least some of the individual defendants did not even work or maintain offices at Occidental. *See Amended Memorandum*, Petitioner's Appendix A, at 8a-10a. Moreover, the petitioner later conceded that the document did not satisfy the requirements for a motion under Rule 7 of the Federal Rules of Civil Procedure.

On March 24, 1986, more than ten days after the District Court's order of dismissal issued, the petitioner untimely filed, but never served, another motion for reconsideration, in which she set forth purported excuses for her sixteen-month delay and attempted to show "good cause" for her failure to attempt service. *See id.* On March 26, the District Court took that "motion" under submission and ordered the petitioner to submit within three weeks any additional supporting argument or evidence.[2] Nevertheless, on March 28, 1986, the petitioner filed a notice of appeal of the February 28, dismissal order, thereby divesting the District Court of jurisdiction.

---

[2]Because the March 24 "motion" was never served, Occidental did not even learn of its existence until receiving the District Court's March 26, order, at which point it obtained a copy from that Court's records. As a result, Occidental was required to secure an *ex parte* order extending its time to serve an opposition.

Occidental filed its opposition in the District Court on April 9, 1986, arguing that (1) the District Court had been divested of jurisdiction and, in any event, (2) it could not grant the petitioner's "motion" because her purported excuses could not as a matter of law constitute "good cause." Occidental filed supplemental memoranda and declarations on April 17, and 29, 1986.

On April 15, 1986, the petitioner filed an extensive reply on the jurisdictional and "good cause" issues, as well as a supplemental reply on April 28, 1986. After this full briefing on both issues, the District Court dismissed the petitioner's "motion" on the grounds that the petitioner's notice of appeal had divested it of jurisdiction.

On May 15, 1986, the petitioner filed a notice of appeal of the District Court's April 29, 1986 order. Pursuant to the request of the parties, the Court of Appeals consolidated both appeals on July 9, 1986.

On January 21, 1988, after extensive briefing, the Court of Appeals issued an unpublished memorandum in which it overlooked a material point of fact, namely, the District Court's entry of judgment of dismissal. *Amended Memorandum*, Petitioner's Appendix A, at 7a. The respondents filed a petition for rehearing and suggestion for rehearing *en banc* on February 4, 1988. After considering the petition for rehearing and the petitioner's opposing briefs, the Ninth Circuit Court of Appeals issued an amended memorandum, in which it affirmed the D strict Court's dismissal. *Amended Memorandum,* Petitioner's Appendix A, at 7a. The petitioner then filed, and only partially served, a series of petitions for rehearing and emergency motions, which the Court of Appeals denied. The petitioner now comes before this Court and frivolously seeks review of the Court of Appeals' application of well-established law to the particular facts of her case.

The petition must be denied for each of the following separate and independent reasons. First, the issue raised by the petitioner does not present and does not involve an important question of *law*. Rather, the question presented turns on a *limited fact pattern* that is unique to the petitioner and the respondents. Second, the petitioner has not raised an issue involving either a serious conflict between the decisions of the Court of Appeals and this Court, between the various Courts of Appeals or within the Ninth Circuit Court of Appeals. The Court of Appeals based its affirmance on settled Supreme Court and Court of Appeals precedents, none of which have been, or should be, challenged in any manner.

Finally, under Rule 22.5 of this Court's rules, the petition should be denied because, despite her status as a practicing attorney for nearly twelve years, the petitioner has failed to present her arguments before this Court with any semblance of clarity, accuracy or brevity. Accordingly, on each of these separate and independent grounds, this Court should deny the petition.

REASONS THE PETITION SHOULD BE DENIED

I. No Reason Exists For Granting The Petition.

A. The issue submitted by the petitioner does not present an important legal problem that warrants review by this Court.

This Court necessarily must reserve its discretion in order to review only those cases which present serious and important legal problems beyond those that are merely "episodic." Sup. Ct. R. 17 (1988); *see also Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955). Thus, this Court has not granted petitions which raise issues that

solely affect the particular parties involved and serve no potential importance for the public. *Rice,* 349 U.S. at 79.

Moreover, in determining which legal problems warrant review, this Court has declined to grant petitions to correct factual or evidentiary issues alleged to have been wrongly decided below. *See, e.g., Texas v. Mead,* 465 U.S. 1041 (1984). The petitioner, here, improperly seeks this Court's review of just such factual and evidentiary issues.

The Court of Appeals affirmed the District Court's dismissal of the petitioner's action on two grounds. First, the Court of Appeals held that the petitioner had divested the District Court of jurisdiction over her action by filing a timely notice of appeal with respect to the District Court's dismissal. Second, the Court of Appeals held that, in any event, the District Court had not abused its discretion by dismissing the petitioner's complaint because the petitioner had been provided an adequate opportunity to establish good cause for her delay in serving the respondents, and had failed to do so. *Amended Memorandum,* Petitioner's Appendix A, at 9a-11a.

The petitioner has not challenged the legal principles applied by the Court of Appeals. Rather, she seeks this Court's review based on her allegations that the Court of Appeals and the District Court wrongly interpreted the specific facts of her case. Under the standards embodied in Rule 17 of this Court's rules, the petitioner thus has failed to submit an appropriate issue for this Court's review and the Court should deny the petition on this separate and independent ground. Sup. Ct. R. 17 (1988); *Rice*, 349 U.S. at 79.

B. The issue submitted by the petitioner does not in any way conflict with other court decisions.

This Court will grant certiorari only to review an issue which presents a real or intolerable conflict with this Court or another court on the same matter of law. Sup. Ct. R. 17 (1988); *see, e.g., Insurance Corp. v. Campagnie des Bauxites*, 456 U.S. 697, 700 (1982). The petition now before this Court presents no such existing conflict. To the contrary, in affirming the District Court's dismissal, the Court of Appeals relied upon established Supreme Court and Ninth Circuit Court of Appeals precedents. Specifically, in its amended memorandum, the Court of Appeals relied, *inter alia*, upon *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), with respect to the jurisdiction issue, and upon *Whale v. United States*, 792 F.2d 951 (9th Cir. 1986) and *Wei v. Hawaii*, 763 F.2d 370 (9th Cir. 1985), with respect to the petitioner's manifold opportunities to show good cause.

Even a cursory reading of those authorities renders it unequivocally clear that no known opinion of this Court, the Ninth Circuit Court of Appeals or any other Court of Appeals conflicts with them. Although the petitioner has expressed at length her disagreement with the Court of Appeals' consistent application of the controlling authorities to the *facts* of her case, such an evidentiary disagreement does not warrant this Court's review. Sup. Ct. R. 17 (1988).

C. The petition does not meet the requisite standard embodied in Rule 22.5 of the Rules of the United States Supreme Court.

Rule 22.5 of the Rules of the United States Supreme Court provides that the Court may deny a petition solely on the basis of the petitioner's failure to present the

issues upon which review is sought "with accuracy, brevity and clearness." Sup. Ct. R. 22.5 (1988). Here, the petitioner utterly has failed even to submit a cognizable Question Presented. Instead, as she has attempted repeatedly before both the District Court and the Court of Appeals, the petitioner merely has set forth a muddle of distorted factual contentions designed to camouflage the patent absence of any issue suitable for review by this Court. For this separate and independent reason, a more *inappropriate* case for this Court's review could hardly be imagined.

CONCLUSION

For each of these separate and independent reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

IRELL & MANELLA
JAMES F. ELLIOTT*
WENDY A. WOLF
1800 Avenue of the Stars
Los Angeles, California 90067
(213) 277-1010
**Counsel of Record*
Counsel for Respondents